Filed 4/17/19 P. v. Tapia CA5
(Opinion following transfer from Supreme Court)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GERMAN F. TAPIA, Defendant and Appellant.	F071147 (Kern Super. Ct. No. BF158485A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Harry A. Staley, Judge. (Retired judge of the Kern County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Conness A. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine

[*] Before Levy, Acting P.J., Smith, J. and Snauffer, J.

Chatman, Raymond L. Brosterhous II and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant German F. Tapia appealed, contending one of his prior prison term enhancements should be stricken because the felony conviction underlying it had been reduced to a misdemeanor pursuant to Proposition 47. We disagreed and affirmed. The Supreme Court granted review and has now transferred the case back to us to vacate our decision and reconsider in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), filed on July 30, 2018. As we explain, we deem this appeal a petition for writ of habeas corpus (*People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal as petition for writ of habeas corpus]),[1] and we now conclude the prior prison term enhancement must be stricken and defendant resentenced. Defendant also contends, and the People concede, that any excess days he served in custody should be converted to outstanding fines. We strike the enhancement and remand.

PROCEDURAL SUMMARY

On December 18, 2014, defendant pled no contest to felony possession of methamphetamine for sale (Health & Saf. Code, § 11378) and admitted a prior prison term allegation based on a 2009 felony conviction for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) in case No. BF127966A.[2]

On January 20, 2015, the trial court sentenced him to the upper term of three years, plus a one-year prior prison term enhancement, to be served as a split sentence of two years in jail, followed by two years of mandatory supervision.

On March 5, 2015, defendant filed a notice of appeal.

---

[1] The parties do not object to our deeming the appeal a habeas proceeding.

[2] Defendant committed the offense on December 3, 2014.

On March 11, 2015, the trial court reduced three of defendant's prior felony convictions for possession of methamphetamine, including the one underlying his prior prison term allegation in this case, to misdemeanors pursuant to Proposition 47. The court did not strike the prior prison term enhancement.

On August 12, 2016, we affirmed in *People v. Tapia* (Aug. 12, 2016, F071147 [nonpub. opn.]).

On September 19, 2018, the Supreme Court transferred the opinion back to this court. The parties have submitted supplemental briefs.

DISCUSSION

I. Prior Prison Term Enhancement

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Proposition 47 also created a new resentencing provision, Penal Code section 1170.18,[3] that provides procedural mechanisms for (1) resentencing of inmates currently serving sentences for Proposition 47-eligible felonies that are now misdemeanors (§ 1170.18, subds. (a), (b)); and (2) designation of Proposition 47-eligible felonies as misdemeanors for persons who have already completed their sentences (§ 1170.18, subds. (f), (g)). (See *Buycks*, *supra*, 5 Cal.5th at p. 876; *People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1092.) Once a felony is reduced to a misdemeanor under Proposition 47, it "shall be considered a misdemeanor for all purposes …." (§ 1170.18, subd. (k).)

---

3 All statutory references are to the Penal Code unless otherwise noted.

In *Buycks*, the Supreme Court resolved an issue on which the appellate courts had disagreed—whether a felony reduced to a misdemeanor under Proposition 47 can still function as the basis for a prior prison term enhancement. *Buycks* concluded that "section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b) enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under [Proposition 47]." (*Buycks*, *supra*, 5 Cal.5th at p. 890.)

Buycks noted, however, that the mechanism for addressing these already imposed but now unsupported enhancements is not specified by Proposition 47: "Proposition 47 does not provide a specific mechanism for recalling and resentencing a judgment solely because a felony-based enhancement has been collaterally affected by the reduction of a conviction to a misdemeanor in a separate judgment." (*Buycks*, *supra*, 5 Cal.5th at p. 892.) *Buycks* provided two options for dealing with these enhancements.

First, *Buycks* explained that when a trial court grants a Proposition 47 petition on a *current* Proposition 47-eligible felony conviction under section 1170.18, subdivision (a), and thus is required to fully resentence the defendant, the court should at that time also reevaluate whether any enhancements in that judgment are no longer applicable because the felony convictions underlying them have also been reduced to misdemeanors under Proposition 47. If so, the court may not reimpose those enhancements "because at that point [a] reduced conviction 'shall be considered as a misdemeanor for all purposes.' (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may … challenge any prison prior enhancement in that judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment." (*Buycks*, *supra*, 5 Cal.5th at pp. 894-895; see *id.* at p. 896.)

Second, *Buycks* explained that even when a trial court grants a Proposition 47 petition on a Proposition 47-eligible felony conviction underlying an enhancement, and not a current Proposition 47-eligible felony conviction in that judgment, the court is

authorized to strike that enhancement: "[A]s to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, … Proposition 47 and the *Estrada*[4] rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under [Proposition 47]." (*Buycks*, *supra*, 5 Cal.5th at p. 888.) But *Buycks* noted that in these cases, where there is no resentencing of a current Proposition 47-eligible felony conviction, another mechanism for challenging the enhancement is required. The court resolved this dilemma by concluding that the defendant may seek relief via a petition for a writ of habeas corpus under section 1170.18, subdivision (k). (*Buycks*, *supra*, at p. 895.) "[T]he collateral consequences of Proposition 47's mandate to have the redesignated offense 'be considered a misdemeanor for all purposes' can properly be enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect. [¶] [T]he 'misdemeanor for all purposes' language of section 1170.18, subdivision (k), is an ameliorative provision distinct from the ameliorative provisions of subdivisions (a) and (f) of the same statute which provide express mechanisms for reducing felony convictions to misdemeanors." (*Id.* at p. 895.) Noting that habeas petitions have been used to afford relief where a collateral attack on enhancements is concerned, *Buycks* concluded a habeas petition is the appropriate vehicle for a defendant to seek relief under such circumstances. (*Id.* at pp. 895-896.)

In this case, the second option applies because the trial court had sentenced defendant before granting his Proposition 47 petition to reduce the conviction underlying his prior prison term enhancement, and there was no Proposition 47-eligible current felony requiring resentencing. Rather than require defendant to file a petition for writ of habeas corpus in the sentencing court, we conclude the better course is to deem this appeal to be a habeas corpus proceeding.

---

4 *In re Estrada* (1965) 63 Cal.2d 740.

II. Discretion to Withdraw Approval of Plea Agreement

The People contend that if we do grant relief and remand for resentencing, the trial court will have the discretion both to reconsider defendant's sentence and to withdraw its former approval of defendant's plea agreement. We disagree on the second point. As we noted above, the California Supreme Court held in *Harris v. Superior Court* (2016) 1 Cal.5th 984 (*Harris*), a case not cited by the People, that the plea agreement survives application of the new law and the prosecution is "not entitled to set aside the plea agreement when a defendant seeks to have his sentence recalled under Proposition 47." (*Harris*, *supra*, at p. 993 [Proposition 47 change in law did not eviscerate underlying plea bargain].) *Harris* explained: "The resentencing process that Proposition 47 established would often prove meaningless if the prosecution could respond to a successful resentencing petition by withdrawing from an underlying plea agreement and reinstating the original charges filed against the [defendant]." (*Harris*, *supra*, at p. 992.) "One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative. [Citations.] Accepting the People's position [that the prosecution should be allowed to withdraw from the plea agreement] would be at odds with that purpose.… 'If a reduction of a sentence under Proposition 47 results in the reinstatement of the original charges and elimination of the plea agreement, the financial and social benefits of Proposition 47 would not be realized, and the voters' intent and expectations would be frustrated.' " (*Ibid*.; see *People v. Hurlic* (2018) 25 Cal.App.5th 50, 57, [resentencing under Senate Bill No. 620 does not affect the plea bargain and thus the prosecution may not seek to set aside the plea].)

We believe *Harris*'s reasoning applies equally to the prospect of a trial court, rather than a prosecutor, rescinding its former approval of the plea agreement. We conclude the plea agreement was subject to future changes in the law, and the subsequent enactment of Proposition 47 did not eviscerate or invalidate the plea agreement. On

remand, neither the parties nor the trial court may reject the plea agreement previously accepted and approved.

III. Excess Custody

The parties agree that any excess time defendant spent in custody should be converted into a minimum of $30 per day (former Pen. Code, § 2900.5 (Stats. 2013, ch. 59, § 7), effective in 2014 when defendant committed the offense) to be applied to any qualifying outstanding fines. We agree.

DISPOSITION

The appeal is deemed to be a petition for writ of habeas corpus. The petition is granted. The prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) based on the 2009 conviction under Health and Safety Code section 11377, subdivision (a) in case No. BF127966A is stricken. The matter is remanded to the trial court for resentencing and for determination of any excess days in custody to be converted into a minimum of $30 per day (former Pen. Code, § 2900.5 (Stats. 2013, ch. 59, § 7), effective in 2014 when defendant committed the offense) to be applied to any qualifying outstanding fines. The court is directed to forward certified copies of the minute order and amended abstract of judgment to the appropriate entities.